

BEFORE THE STATE BOARD OF EDUCATION OF THE STATE OF NEBRASKA

LANCASTER COUNTY SCHOOL)
DISTRICT 0001, a/k/a LINCOLN PUBLIC)
SCHOOLS,)
)
Petitioner,)
)
vs.)
)
NEMAHA COUNTY SCHOOL DISTRICT)
0029, a/k/a AUBURN PUBLIC SCHOOLS)
and DR. ROGER BREED, in his capacity as)
COMMISSIONER OF THE NEBRASKA)
DEPARTMENT OF EDUCATION,)
)
Respondents)

Case No. 11-13

**RESPONSIVE PLEADING OF
RESPONDENT AUBURN PUBLIC
SCHOOLS**

Comes now Respondent Nemaha County School District 0029, a/k/a Auburn Public Schools (Auburn) and for its response to the petition filed herein by Lancaster County School District 0001 (Lincoln) states as follows:

1. Paragraph 1 of the petition is admitted.
2. Paragraph 2 of the petition is admitted.
3. With respect to paragraph 3 of the petition, Auburn admits that under the provisions of the NEB. REV. STAT. § 79-215(10)(b) it was responsible to contract with Lincoln educational services for M.W. Auburn admits that Lincoln and Auburn engaged in negotiations regarding the terms of a proposed contract for the 2010-2011 school year but were unable to reach agreement regarding the amount Auburn would pay to Lincoln to educate and provide special education services to M.W. Auburn admits that Exhibit "A" attached to the petition is a true and accurate copy of the contract that Lincoln proposed to Auburn to educate M.W. during the 2010-2011 school year. Auburn denies that Lincoln's tuition rates as set forth on Exhibit "B" attached to the petition are fair and

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NEBRASKA DEPARTMENT OF EDUCATION

reasonable and denies that the rates are based on actual costs. Auburn does not have sufficient information to either admit or deny the remaining allegations in paragraph 3 of the petition and accordingly denies all such allegations.

4. Paragraph 4 of the petition is admitted.
5. With respect to paragraph 5 of the petition, Auburn admits that Exhibit "C" attached to the petition is a true and accurate copy of the determination made by Dr. Breed and that said exhibit speaks for itself. Except as expressly admitted herein, the allegations in paragraph 5 are denied.
6. With respect to paragraph 6, Auburn states that Rule 19.004.02 which purports to provide for an appeal under the provisions of the Administrative Procedures Act (the "Act"), NEB. REV. STAT. §§ 84-901 to 84-920 is *ultra vires* and void. The Act is applicable only to a "contested case." Under the Act, a contested case means "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." NEB. REV. STAT. § 79-215(10)(b) does not require the Department of Education to hold a hearing before making a determination. Lincoln did not have a constitutional right to a hearing in connection with the determination made by the Commissioner. The Nebraska Department of Education could not through the adoption of an administrative regulation extend application of the Act to a matter which would not constitute a "contested case" in the absence of the regulation.
7. Paragraph 7 of the petition is denied. To the extent that Lincoln is asking to be reimbursed for the actual costs which it incurred in educating M. W., Auburn states that

such costs are not a factor to be considered by the Department of Education in making a determination under § 79-215(10)(b).

8. With respect to paragraph 8 of the petition, Auburn states that a true and correct copy of Dr. breed's determination is attached to the petition and marked Exhibit "C". That document speaks for itself as to the methodology used by Dr. breed in arriving at his decision. Except as specifically admitted herein, the allegations in paragraph 8 of the petition are denied.
9. With respect to paragraph 9, Auburn admits that M.W. is verified as a student with autism; that he has special needs; that he requires specialized services and teachers; and that he must be educated in a pull-out resource program. Except as specifically admitted herein, the allegations in paragraph 9 of the petition are denied.
10. With respect to paragraph 10 of the petition, Auburn states that a true and correct copy of Dr. breed's determination is attached to the petition and marked Exhibit "C". That document speaks for itself as to the methodology used by Dr. breed in arriving at his decision. Except as specifically admitted herein, the allegations in paragraph 10 of the petition are denied.
11. Paragraph 11 of the petition is denied.
12. Paragraph 12 of the petition is denied.
13. Except as specifically admitted herein, all allegations in the petition are denied.

Defenses

14. **Lincoln's Appeal Is Not a "Contested Case" Which Is Subject to Adjudication Under the Provisions of the Administrative Procedures Act.** For the reasons set forth

in paragraph 6 above, the Nebraska State Board of Education lacks jurisdiction to hear and decide this case under the Provisions of the Administrative Procedures Act.

15. **Lincoln Lacks Standing to Assert That NEB. REV. STAT. § 79-215 (10)(b) Is Unconstitutional.** In paragraph 12 of the petition Lincoln alleges that NEB. REV. STAT. § 79-215(10)(b) is unconstitutional in that it allegedly violates Article VIII, sections 1 and 4 of the Nebraska Constitution. Lincoln does not have standing to assert that constitutional claim because it is not a taxpayer and has no right or authority to assert claims in this proceeding on behalf of its taxpayers.
16. **The Nebraska State Board of Education Has No Authority to Declare Any Statute Unconstitutional.** The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government set forth in the Nebraska Constitution. Thus, neither the hearing officer nor the Nebraska State Board of Education has the authority to declare § 79-215(10)(b) to be unconstitutional as alleged in paragraph 12 of the petition.
17. **Lincoln Has Invoked and Is Seeking the Benefits of § 79-215(10)(b).** The law in Nebraska is that "A litigant who invokes the provisions of a statute may not challenge its validity or seek the benefit of such statute and in the same action and at the same time question its constitutionality. *State ex rel. Bellino v. Moore*, 254 Neb. 385, 576 N.W.2d 793 (1998). In this case, Lincoln has invoked § 79-215(10)(b) and is seeking the benefit of that statute. Accordingly, Lincoln may not also challenge the constitutionality of that statute in this proceeding.

18. **The Nebraska State Board of Education Cannot Rewrite § 79-215(10)(b).** Even if § 79-215(10)(b) were unconstitutional, neither the Nebraska State Board of Education nor a court of law on appeal has the authority to rewrite that statute to provide for the computation of reimbursement calculated in a manner other than that specified by the Legislature.

WHEREFORE, Auburn prays that the petition be dismissed for lack of subject matter jurisdiction or alternatively that the decision of the Commissioner be affirmed in all respects.

DATED this 3rd day of October, 2011.

NEMAHA COUNTY SCHOOL DISTRICT
0029, a/k/a AUBURN PUBLIC SCHOOLS,
Respondent

By: STENBERG LAW OFFICE
Neal E. Stenberg – #14025
285 S. 68th St. Place, Suite 207
Lincoln, NE 68510
(402) 486-0415 (Phone)
StenbergLaw@neb.nr.com

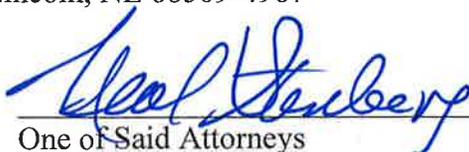

One of Said Attorneys

Certificate of Service

The undersigned hereby certifies that a copy of the above and foregoing **RESPONSIVE PLEADING OF RESPONDENT AUBURN PUBLIC SCHOOLS** was mailed via United States Mail, postage prepaid, on this 3rd day of October, 2011 to:

Jeanette Stull, Esq.
PERRY, GUTHERY, HAASE & GESSFORD
233 South 13th Street. Ste. 1400
Lincoln, NE 68508
Attorney for Petitioner

Margaret Worth, Esq.
NEBRASKA DEPARTMENT OF
EDUCATION
301 Centennial Mall South
P.O. Box 94987
Lincoln, NE 68509-4987


One of Said Attorneys

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

LANCASTER COUNTY SCHOOL.)
DISTRICT 0001, a/k/a LINCOLN PUBLIC)
SCHOOLS,)

Case No. 11-13

Petitioner,)

vs.)

NEMAHA COUNTY SCHOOL DISTRICT)
0029, a/k/a AUBURN PUBLIC SCHOOLS)
And DR. ROGER BREED, in his capacity as)
COMMISSIONER OF THE NEBRASKA)
DEPARTMENT OF EDUCATION,)

RESPONSIVE PLEADING OF
RESPONDENT DR. ROGER D. BREED,
COMMISSIONER OF EDUCATION,
NEBRASKA DEPARTMENT OF
EDUCATION

Respondents.)

COMES NOW Respondent Dr. Roger D. Breed (Dr. Breed), in his capacity as Commissioner of the Nebraska Department of Education, and for its response to the petition filed herein by Lancaster County School District 001 (Lincoln) states as follows:

1. Paragraph 1 of the petition is admitted.
2. Dr. Breed does not have sufficient information to either admit or deny the allegations in paragraph 2 of the petition and accordingly denies all such allegations.
3. Dr. Breed does not have sufficient information to either admit or deny the allegations in paragraph 3 of the petition and accordingly denies all such allegations.
4. With regard to paragraph 4, Dr. Breed states that Lincoln requested that the Nebraska Department of Education (NDE) make a determination of the contract amount to be paid by Auburn Public Schools (Auburn) to Lincoln for educational services to M.W. and that Lincoln made this request pursuant to Neb. Rev. Stat. § 79-215(10)(b) R.S. Supp. 2010. Except as specifically admitted herein, the allegations in paragraph 4 of the petition are denied.

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NEBRASKA DEPARTMENT OF EDUCATION		

5. With regard to paragraph 5, Dr. Breed admits that Exhibit “C”, which is attached to the petition, is a true and accurate copy of his determination issued August 23, 2011. Dr. Breed states that consideration was given to all of the documents listed on pages 1 and 2 of his determination and to the four factors listed in Neb. Rev. Stat. § 79-2115(10)(b), R.S. Supp, 2010, and Subsection 004 of 92 NAC 19, *Regulations Regarding School Enrollment*, effective November 1, 2010, (Rule 19). Dr. Breed states that Exhibit C speaks for itself with regard to his conclusions as to the contract amount. Except as specifically admitted herein, the allegations in paragraph 5 of the petition are denied.
6. Dr. Breed admits that Lincoln disagrees with his determination. Dr. Breed states that Subsection 004.02 of Rule 19 permits a school district that is dissatisfied with the determination of the Commissioner to appeal the determination to the State Board of Education (Board), not to NDE, pursuant to 92 NAC 61, *Rules of Practice and Procedure for Hearings in Contested Cases Before the Department*, effective October 1, 1997 (Rule 61). Dr. Breed states that Subsection 004.01 of Rule 61 specifies that a contested case begins with the filing of a petition with the Board, not with NDE. Dr. Breed states that Subsection 004.04A of Rule 61 requires that the petition shall contain a heading specifying the name of the Board, not NDE. Except as specifically admitted herein, the allegations in paragraph 6 of the petition are denied.
7. Dr. Breed does not have sufficient information to admit or deny the allegations in paragraph 7 of the petition and accordingly denies such allegations. Dr. Breed states that Lincoln’s actual costs for educational services to M.W. is not one of the factors required to be considered in order to make a determination under 79-215(10)(b).
8. The allegations in paragraph 8 of the petition are denied.
9. Dr. Breed does not have sufficient information to admit or deny the allegations in paragraph 9 of the petition and accordingly denies such allegations.
10. Paragraph 10 of the petition is denied.
11. Paragraph 11 of the petition is denied.

12. Paragraph 12 of the petition is denied.

13. Except as specifically admitted herein, all allegations in the petition are denied.

Defense

14. **The State Board of Education Has No Authority to Declare A Statute to Be Unconstitutional.** The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government set for the in the Nebraska Constitution. *Metropolitan Utilities Dist. V. Merritt Beach Co.*, 179 Neb. 783, 140 N.W. 2d 626 (Neb. 1966). Agency regulations, properly adopted and filed with the Secretary of State, have the effect of statutory law. *In re Jorge O.*, 280 Neb. 411, 786 N.W. 2d 343 (Neb. 2010). Thus, neither the Hearing Officer nor the State Board of Education has authority to declare either §79-215(10)(b) or any other related statute or Subsection 004 of Rule 19, to be unconstitutional as alleged in paragraph 12 of the petition.

WHEREFORE, Dr. Breed prays that Lincoln's constitutional claims be dismissed for lack of subject matter jurisdiction and that his determination be affirmed in all respects.

DATED this 30th day of September, 2011.

DR. ROGER D. BREED, COMMISSIONER OF
EDUCATION, NEBRASKA DEPARTMENT OF
EDUCATION,
Respondent.

BY:


Margaret D. Worth, #15887
General Counsel
Department of Education
P.O. Box 94987
Lincoln, NE 68509-4987
(402) 471-0312 (Phone)

CERTIFICATE OF SERVICE

The undersigned certifies that the original of this document was filed with the State Board of Education by hand-delivery to its official office at the State Office Building, 6th floor, 301 Centennial Mall South, Lincoln, Nebraska, 68509, and copies of this document were served on the following by United States first-class mail, postage-prepaid to the following on September 30, 2011:

Jeanette Stull, Attorney for Petitioner
PERRY, GUTHERY, HAASE & GESSFORD, P.C., L.L.O.
233 South 13th Street, Ste. 1400
Lincoln, NE 68508

Neal Stenberg, Attorney for Respondent
Stenberg Law Office
285 S. 68th Street Place, #207
Lincoln, NE 68510

And sent inter-office state mail to:

Leslie Donley, Assistant Attorney General
Attorney for the State Board of Education
Office of the Attorney General
2115 State Capitol Building
Lincoln, NE 68509-8920



Margaret D. Worth, #15887
General Counsel
Department of Education
P.O. Box 94987
Lincoln, NE 68509-4987



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

September 14, 2011

VIA CERTIFIED MAIL

Neal Stenberg
STENBERG LAW OFFICE
285 S. 68th Street Place, #207
Lincoln, NE 68510

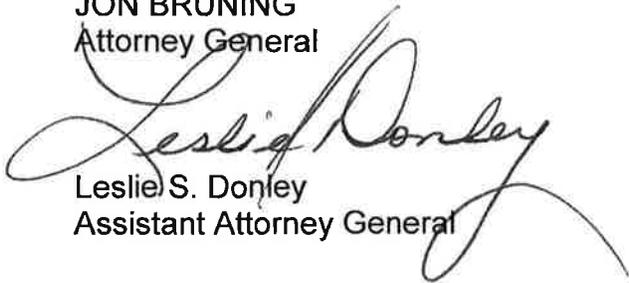
RE: Notice of Case No. 11-13, *Lancaster County School District 0001, a/k/a Lincoln Public Schools, Petitioner v. Nemaha County School District 0029, a/k/a Auburn Public Schools; and Dr. Roger Breed, in his capacity as Commissioner of the Nebraska Department of Education, Respondents.*

Dear Mr. Stenberg:

Pursuant to Title 92, *Nebraska Administrative Code*, Chapter 61, § 004.06, enclosed please find a copy of the above-referenced petition filed with the State Board of Education on September 2, 2011.

Sincerely,

JON BRUNING
Attorney General

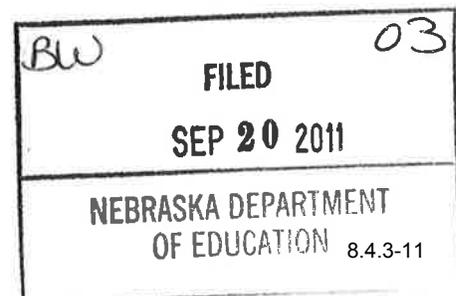

Leslie S. Donley
Assistant Attorney General

Enclosure

cc: Stephen Kennedy
Kevin Reiman
Margaret Worth (w/o enc.)
Jeanette Stull (w/o enc.)

49-663-30

11.09.11 State Board of Education



SENDER: COMPLETE THIS SECTION

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- Print your name and address on the reverse so that we can return the card to you.
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1. Article Addressed to:

Neal Stenberg
Stenberg Law Office
285 S. 68th Street Place, #207
Lincoln, NE
68510

2. Article Number
(Transfer from service label)

7011 0470 0002 5455 9262

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A. Signature

X

- Agent
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B. Received by (.Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No.

3. Service Type

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4. Restricted Delivery? (Extra Fee) Yes

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102595-02-M-1540

ON
ATTOR
115 STAT
LINCOLN, NE

PS Form 3800, August 2006
See Reverse for Instructions

Sent To: Neal Stenberg - Stenberg Law Office
Street, Apt. No., or PO Box No.: 285 S. 68th Street Place, #207
City, State, ZIP+4: Lincoln, NE 68510

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Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

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CERTIFIED MAIL™

Neal Stenberg
STENBERG LAW OFFICE
285 S. 68th Street Place, #207
Lincoln, NE 68510

ST
a-14-11

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <input checked="" type="checkbox"/> Addressee <input type="checkbox"/> Agent</p> <p>B. Received by (Printed Name) C. Date of Delivery 9-15-11</p>
<p>1. Article Addressed to:</p> <p style="font-family: cursive;">Neal Stenberg Stenberg Law Office 285 S. 68th Street Place #207 Lincoln, NE 68510</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>
<p>2. Article Number (Transfer from service label)</p>	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p>7011 0470 0002 5455 9262</p>	

PS Form 3811, February 2004

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STATE OF NEBRASKA
Office of the Attorney General

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FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

September 14, 2011

VIA HAND DELIVERY

Roger D. Breed, Ed.D.
Commissioner of Education
301 Centennial Mall South, Sixth Floor
Lincoln, NE 68509

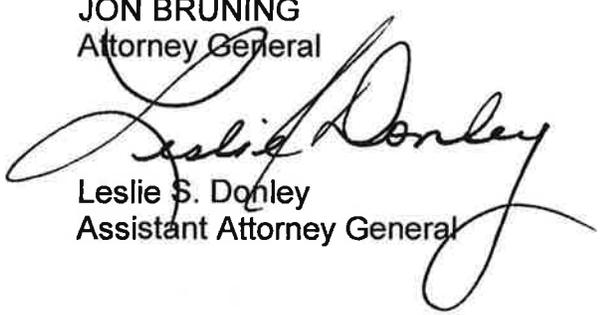
RE: Notice of Case No. 11-13, *Lancaster County School District 0001, a/k/a Lincoln Public Schools, Petitioner v. Nemaha County School District 0029, a/k/a Auburn Public Schools, and Dr. Roger Breed, in his capacity as Commissioner of the Nebraska Department of Education, Respondents.*

Dear Commissioner Breed:

Pursuant to Title 92, *Nebraska Administrative Code*, Chapter 61, § 004.06, enclosed please find a copy of the above-referenced petition filed with the State Board of Education on September 2, 2011.

Sincerely,

JON BRUNING
Attorney General


Leslie S. Donley
Assistant Attorney General

Enclosure

cc: Margaret Worth
Stephen Kennedy (w/o enc.)
Kevin Reiman (w/o enc.)
Jeanette Stull (w/o enc.)

49-662-30

11.09.11 State Board of Education

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SEP 14 2011		
NEBRASKA DEPARTMENT OF EDUCATION		
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BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION



LANCASTER COUNTY SCHOOL)
DISTRICT 0001, a/k/a LINCOLN PUBLIC)
SCHOOLS,)

Case No. 11-13

Petitioner,)

vs.)

PETITION AND REQUEST
FOR HEARING

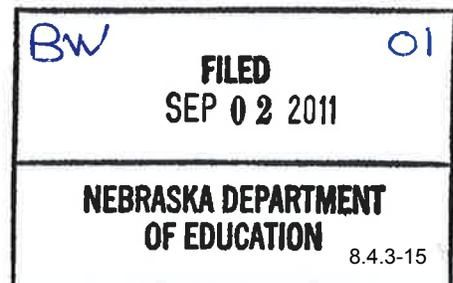
NEMAHA COUNTY SCHOOL)
DISTRICT 0029, a/k/a AUBURN PUBLIC)
SCHOOLS, and DR. ROGER BREED, in)
his capacity as COMMISSIONER OF THE)
NEBRASKA DEPARTMENT OF)
EDUCATION,)

Respondents.)

Petitioner, Lancaster County School District 0001, a/k/a Lincoln Public Schools, for its
Petition, alleges as follows:

1. The Petitioner in this action is Lancaster County School District 0001, a/k/a
Lincoln Public Schools ("LPS"), whose address is P.O. Box 82889, 3801 South 14th Street,
Lincoln, NE 68501. The Respondents, along with their addresses, are Nemaha County School
District 0029, a/k/a Auburn Public Schools, ("Auburn"), 1713 J Street, Auburn, NE 68305, and
Dr. Roger Breed, in his capacity as Commissioner of the Nebraska Department of Education,
("Dr. Breed"), P.O. Box 94987, State Office Building, 6th Floor, 301 Centennial Mall South,
Lincoln, NE 68509-4987.

2. M.W. is a student with a verified disability who was being served by LPS at
Lincoln East High School during the 2010-2011 school year. M.W. is originally from Auburn,
Nebraska, but he was residing in a group home located in the LPS district during the 2010-2011
school year. M.W. is not a state ward.



3. Pursuant to Neb. Rev. Stat. § 79-215(10)(b), Auburn is responsible to contract with LPS for educational services for M.W. LPS and Auburn engaged in negotiations regarding the terms of a proposed contract for the 2010-2011 school year, but were unable to reach agreement regarding the amount Auburn would pay LPS to educate and provide special education services to M.W. Attached hereto as Exhibit "A" is a true and accurate copy of the contract that LPS proposed to Auburn, which requested payment of \$70,000 (\$388.89 per day in a 180-day school year) to educate M.W. during the 2010-2011 school year. Attached hereto as Exhibit "B" is a true and accurate copy of BA#3 issued by LPS in August 2010 which sets forth LPS's Board of Education-approved tuition rates for the 2010-2011 school year. During that school year, LPS charged out-of-district students \$70,000 per year to educate special education students who were moderately mentally handicapped or had a dual diagnosis. M.W.'s diagnosis fell within that category. LPS's tuition rates are fair and reasonable based on the actual cost of educating students within the particular categories set forth on Exhibit "B."

4. In light of LPS and Auburn's disagreement, LPS submitted a request to the Nebraska Department of Education ("NDE") to determine the appropriate amount to be paid to LPS. The request was submitted pursuant to Neb. Rev. Stat. § 79-215(10)(b) and 92 NAC 19.004 (a portion of NDE Rule 19, hereinafter "Rule 19").

5. After considering correspondence and documents submitted by LPS and Auburn, Dr. Breed issued a determination on or about August 23, 2011. A true and accurate copy of Dr. Breed's determination is attached as Exhibit "C." In reaching his determination, Dr. Breed considered the four factors set forth in § 79-215(10)(b) and Rule 19.004: (1) the needs of the

student, (2) approved special education rates, (3) NDE's general experience with special education budgets, and (4) the cost per student in the district in which such residential setting is located. Dr. Breed concluded that LPS was entitled to payment of \$38,937 from Auburn for the costs of educating M.W. during the 2010-2011 school year.

6. LPS disagrees with Dr. Breed's determination. As such, pursuant to Rule 19.004.02, LPS files this Petition to appeal Dr. Breed's determination to NDE.

7. LPS sought payment for the actual costs it incurred in educating M.W., including the costs of teachers, paraeducators, special education coordinators, IEP team members, speech/language therapists, occupational/physical therapists, school psychologists, school nurse/health technician, administrative support, printing, supplies, and equipment, all of which were actually expended in educating M.W. LPS provided documentation to Dr. Breed that itemized the services provided to M.W. and showing the precise cost of such services to be \$68,637.94.

8. Rather than allowing LPS to be reimbursed for its actual expenses, Dr. Breed considered things such as average per pupil costs for special education students throughout the state, special education budgets in Nebraska, and the cost per regular student in the LPS district. In reaching his determination, the only consideration Dr. Breed gave to the special needs of M.W. was acknowledging that he was in a 100% pull-out program, placing M.W. in a category of needing "even more intense programs (in pull-out programs 61% to 100% of the time)." As such, Dr. Breed lumped a broad range of students together and failed to consider the intensity of the services needed by M.W. Furthermore, Dr. Breed used a multiplier of 3 to determine the average per pupil cost for special education students in the 61-100% pull-out category—a

multiplier that has no basis in Nebraska's statutes or regulations.

9. M.W. is verified as a student with autism. He is a student with an extremely high level of special needs, requiring a one-on-one paraeducator at all times, many specialized teachers, and specialized services such as speech/language, occupational, and physical therapy. M.W. is unable to be educated in a regular classroom and must be in a pull-out resource program 100% of the school day.

10. Dr. Breed disregarded the actual costs of educating M.W. supplied by both LPS and Auburn because he did not "have an adequate basis for evaluating this information," despite the fact that neither Auburn nor LPS appeared to dispute each other's actual costs as reported to Dr. Breed.

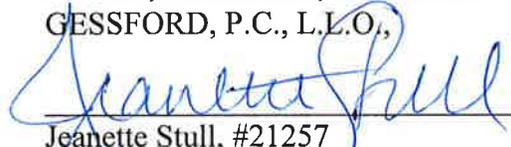
11. Of the four factors listed in § 79-215(10)(b) and Rule 19.004, the key factor in this case is the first factor—the needs of the student. Because M.W. is a very high needs student, averages and general per pupil costs are not adequate to address his unique needs and provide him an appropriate education. Dr. Breed's determination does not sufficiently consider the needs of M.W. and emphasizes other factors that are less relevant to this situation. Dr. Breed erred in his determination that LPS was entitled to only \$38,937 for educating M.W. during the 2010-2011 school year.

12. To the extent that § 79-215(10)(b), Rule 19.004, and related statutes and regulations require LPS to educate a student outside of its district without being fully compensated for the actual costs of educating that student, the statutes and rules violate Article VIII, sections 1 and 4 of the Nebraska Constitution.

WHEREFORE, Petitioner requests a hearing before the NDE and prays that the NDE determine that Auburn should pay LPS \$70,000 for the costs of educating M.W. during the 2010-2011 school year.

LANCASTER COUNTY SCHOOL
DISTRICT 0001, a/k/a LINCOLN PUBLIC
SCHOOLS, Petitioner,

BY: PERRY, GUTHERY, HAASE &
GESSFORD, P.C., L.L.O.,

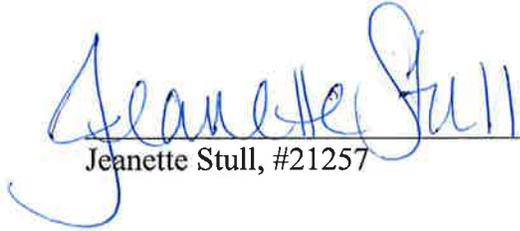
BY: 

Jeanette Stull, #21257
233 South 13th Street, Ste. 1400
Lincoln, Nebraska 68508
(402) 476-9200
jstull@perrylawfirm

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Petition and Request for Hearing was served via hand-delivery on the following on this 2nd day of September, 2011:

Nebraska Department of Education
P.O. Box 94987
State Office Building, 6th Floor
301 Centennial Mall South
Lincoln, NE 68509-4987


Jeanette Stull, #21257

**AGREEMENT FOR EDUCATIONAL SERVICES
PURSUANT TO NEB. REV. STAT. § 79-215(10)
2010-11 SCHOOL YEAR**

THIS AGREEMENT is made and entered into by and between Lincoln Public Schools ("LPS") and Nemaha County School District 64-0029 (Auburn Public Schools) for educational services to Murphy Waddell ("Student") pursuant to Neb. Rev. Stat. § 79-215(10).

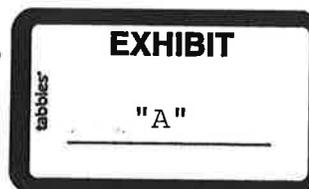
RECITALS

This contract is subject to the condition that the following recitals be true and accurate:

- A. The Student is not a ward of the state or ward of any court.
- B. The Student is residing in DSN Group Home ("Facility"), a residential facility which is certified or licensed by the Department of Health and Human Services and, if not so certified or licensed, the Student is enrolled in the medical assistance program established pursuant to the Medical Assistance Act and Title XIX or XXI of the federal Social Security Act, as amended.
- C. The Student was unilaterally placed at the Facility for reasons other than to receive an education.
- D. The Student resided in Auburn immediately prior to his placement in the Facility and is a resident of Auburn for purposes of student enrollment.
- E. The Facility does not maintain its own Rule 18 interim-program school, or an approved or accredited school. Auburn Public Schools and the Student's parent have agreed that Auburn Public Schools cannot provide an appropriate education while the Student is in the Facility.

LPS and Auburn Public Schools agree to the following:

- 1. **Recitals.** The foregoing Recitals are an integral part of this Agreement and are incorporated herein by this reference.
- 2. **Term of Agreement.** The term of this Agreement shall be for the 2010-11 school year. The agreement may be terminated by either party without cause upon 30 days written notice. This agreement shall automatically terminate effective upon the occurrence of any of the following: (a) any of the Recitals is not true and accurate or fails in the future to be true and accurate; (b) either party no longer has a responsibility to contract for the provision of educational services for the Student (including without limitation in the event there is a change of the Student's residence for purposes of school enrollment or Student becomes a ward of the state or court); or (c) the Student is placed other than at the Facility.
- 3. **Services.** LPS shall provide Student with educational services in accordance with all legal requirements to which LPS is subject. All legal responsibility for special education and related services to Student, if any, is transferred to LPS.



4. **Indemnification.** Auburn Public Schools and LPS hereby agree to indemnify, defend, and hold each other harmless from any and all damages and liabilities arising from a breach or noncompliance of their obligations under this Agreement. The foregoing indemnification obligation shall continue notwithstanding the expiration or termination of this Agreement.

5. **Payment for Services.** Auburn Public Schools shall pay LPS at the rate of \$388.89 for educational services each school day in which Student is provided educational services by LPS from and after August 18, 2010 (the date the obligation to enter into this contract) and continuing for the term of this Agreement. A school day is a day in which LPS is in regular session. A school day shall not include any service days outside of the LPS regular school day or school calendar (e.g. extended days or summer school services) unless the Student's IEP provides for extended school year (ESY) services; and in such event only to the extent such services are provided for in the Student's IEP. Other educational services (e.g. speech pathology or transportation) shall only be paid to the extent provided in accordance with the Student's IEP and, where applicable, shall be payable at the Reimbursable Hourly Rate Limitations approved by Nebraska Department of Education. The rate is subject to adjustment upon mutual agreement.

Auburn Public Schools shall pay for the educational services provided on a monthly basis upon receipt of invoices for such with such detail as Auburn Public Schools may require for payment. Payment will be made within 30 days of receipt of such invoice.

6. **E-Verify.** LPS shall use a federal immigration verification system to determine the work eligibility status of new (October 1, 2009, and thereafter) employees physically performing services within the State of Nebraska.

7. **No Admission or Precedent.** Auburn Public Schools and LPS have agreed to the terms of this Agreement to address the unique circumstances relating to the providing of education services for Student and agree that this Agreement shall not establish a precedent with regard to other students of Auburn Public Schools who may be admitted to the Facility.

Lincoln Public Schools

Auburn Public Schools

By: _____

By: _____

Its: Associate Superintendent for Business Affairs

Its: _____

Dated: _____

Dated: _____

**Explanation of
SPECIAL EDUCATION SERVICES
for
Murphy Waddell
2010-11**

Description of Services	Units in Contract	Daily/Hourly Rate*	Yearly Total
Mentally Handicapped – Moderate	Year		\$70,000.00
Yearly Total			\$70,000.00

***Benefits include: Social Security, Medicare, Workers Compensation, State Retirement, and other benefits**

2010-11

BA #3

Date Issued 8/2010

TO: ALL PRINCIPALS, SCHOOL OFFICE PERSONNEL, GUIDANCE COUNSELORS, and DIRECTORS

**FROM: Mark Shepard, Associate Superintendent for Business Affairs
Terry Macholan, Director of Student Services
Jill Pauley, Director of Fiscal Services and Planning
Connie Knoche, Director of Finance**

SUBJECT: TUITION – PROCEDURES

I. GENERAL

Students who have not been officially approved for enrollment by the Office of Student Services, LPSDO, 5901 O Street, Phone 436-1651, have no legal standing, contract, or property rights to attend school within Lincoln Public Schools, and are not entitled to enrollment or attendance. Any such student so enrolled or attending may be disenrolled upon a determination by the Office of Student Services that the necessary preconditions for enrollment are not satisfied. Enrollment and attendance are permitted for students as required by law. Students not covered below, or in questionable circumstances, must be processed for enrollment and attendance through the Office of Student Services.

II. APPLICATION FOR ADMISSION TO THE LINCOLN PUBLIC SCHOOLS

A. Responsibilities

1. **Principal** – Principals are not to enroll a student when the parents do not live in the School District. Such attendance requests are to be referred to the Office of Student Services for the purpose of completing an application for admission to the Lincoln Public Schools. Principals or the Office of Student Services must obtain all required student information, forms, and signatures prior to enrollment or attendance.
2. **Applicant** – Application is made at the Office of Student Services by the person with whom the student is residing and not by the student.
3. **Office of Student Services** – Applications for admission to the Lincoln Public Schools shall be executed in the Office of Student Services, LPSDO, and 5901 "O" Street, phone 436-1651.

When requesting enrollment in a school other than the one serving their area of residence, the person with whom the student is residing must also file for approval of transfer for the student by completing an



Application for Special Attendance Permit at the Office of Student Services.

Notice of recommended approval or disapproval, as determined by the Director of Student Services, will be sent to the applicant and principal.

III. ENROLLMENT OPTION

- A. Students wishing to attend a school in Lincoln, but who live outside the Lincoln Public Schools' boundary, may apply for enrollment under the Enrollment Option laws if they meet board policy guidelines.
- B. Information on Enrollment Option may be obtained from the Office of Student Services.
- C. The Board of Education determines specific deadlines for Enrollment Option applications. This information may be obtained from the Office of Student Services.

IV. TUITION STUDENTS

Students who live outside of the Lincoln Public Schools' District and who do not qualify under the above categories must apply for permission to attend the Lincoln Public Schools at the Office of Student Services. In the case where another district is seeking to contract with LPS for the education of one of their resident students, the sending district should contact the Business Affairs Office at 436-1636.

V. TUITION RATES 2010-11

A. Regular Instructional Program

	PER YEAR	PER SEMESTER	PER DAY*
Grades K-6	\$8,100.00	\$4,050.00	\$46.02
Grades 7-8	\$9,750.00	\$4,875.00	\$54.17
Grades 9-12	\$11,350.00	\$5,675.00	\$63.06

* Based on 176 days elementary, 180 days secondary

B. Special Education Programs

	PER YEAR ALL LEVELS	PER DAY*
Mentally Handicapped – Mild	\$ 10,500.00	\$ 59.66
Mentally Handicapped – Mod/Dual Diagnosis	\$ 70,000.00	\$397.73
Mentally Handicapped – Severe/Profound	\$145,000.00	\$823.86
Hearing Impaired**	\$ 26,000.00	\$147.73
Orthopedically Impaired	\$ 8,100.00	\$ 46.02
Behaviorally Disordered	\$ 24,000.00	\$136.36
Learning Disabled	\$ 8,200.00	\$ 46.59
Visually Impaired	\$ 36,500.00	\$207.39

* Based on 176 days

** Interpreter will be added if required

C. Specialized services in addition to special education programs listed in B:

	PER HOUR
Homebound	\$48.00***
Speech Therapy	\$48.00***
Physical/Occupational Therapy	\$57.00***

*** Resource teacher only

VI. Payment of Tuition

In Advance – Tuition shall be charged for all students who do not legally reside within the District and who are not entitled to a free education in the District, regardless of the length of time involved. All tuition payments must be made in advance. The minimum payment shall be one school semester or to the end of the semester in which the student is enrolled. Students who have not been approved for enrollment by the Office of Student Services should not be allowed to enroll or attend.



Roger D. Breed, Ed.D., Commissioner
Scott Swisher, Ed.D., Deputy Commissioner

301 Centennial Mall South Tel: (402) 471-2295
PO Box 94987 Fax: (402) 471-0117
Lincoln, NE 68509-4987 Web: www.education.ne.gov

August 23, 2011

Dr. Kris Reckeway, Ph.D.
Director of Special Education
Lincoln Public Schools
P.O. Box 82889
Lincoln NE 68501

Mr. Steve Schneider, Superintendent
Auburn Public Schools
1713 J Street
Auburn NE 68305

Ms. Lynn Dierberger, Special Education Coordinator
Auburn Public Schools
1713 J Street
Auburn NE 68305

RE: Lincoln Public Schools' Request for Commissioner's Determination #R19-004-02-11

Dear Dr. Reckeway, Mr. Schneider and Ms. Dierberger:

I am writing in response to Lincoln Public Schools' request for a determination of the contract amount to be paid by Auburn Public Schools to Lincoln Public Schools for education services to M.W. for the 2010-2011 school year. I am making this determination pursuant to the provisions of Neb. Rev. Stat. 79-215 and Subsection 004 of 92 NAC 19 (NDE Rule 19).

In making this determination, I have considered the following:

1. Letter, with enclosures, from Dr. Reckeway dated January 19, 2011, requesting a contract payment determination.
2. Letter from Mr. Schneider and Ms. Dierberger dated February 8, 2011, responding Lincoln Public Schools' request and providing information.
3. Letter from Dr. Reckeway, Ms. Susan Safarik, and Ms. Jill Pauley, with enclosures, dated April 1, 2011, providing clarification.
4. Neb. Rev. Stat. 79-215
5. Neb. Rev. Stat. 79-598(3)
6. 92 NAC 19 (NDE Rule 19) eff. Nov. 2010.
7. 92 NAC 51 (NDE Rule 51) eff. May 15, 2010
8. Special Education Final Financial Report from LPS for the 2009-2010 school year.

9. Report from the NDE Nebraska Staff and Student Records System (NSSRS) on the number of LPS students with verified disabilities for the 2009-2010 school year.
10. Report from the NDE NSSRS on the number of LPS students with verified disabilities in various public school settings as of October 1, 2009.
11. LPA Annual Financial Report (AFR) for the 2009-2010 school year.
12. Report of LPS – 2009-10 IDEA E/P expenditures (NIS).

Based on the information received from Lincoln Public Schools (LPS) and Auburn Public Schools (Auburn), I understand the relevant facts to be as follows:

1. M.W. is a student with a verified disability being served by LPS at East High School. M.W. is originally from Auburn and has been placed in a group home in the LPS school district.
2. M.W. is not a ward.
3. LPS and Auburn agree that Auburn has a responsibility to contract with LPS for educational services for M.W. pursuant to Neb. Rev. Stat. 79-215(10)(b).
4. LPS and Auburn disagree on the amount of the proposed contract for the 2010-2011 school year and ask that I make a determination of the amount pursuant to Neb. Rev. Stat. 79-215(10)(b).
5. M.W. receives special education services 100% of the time without regular education peers in a pull-out program provided directly by LPS.

The law applicable to this determination is Neb. Rev. Stat. 79-215(10)(a) and (b) R.S.Supp. 2010. The applicable regulations are found in Section 004 of 92 NAC 19 (NDE Rule 19), *Regulations Regarding School Enrollment*, effective November 1, 2010. Both the statute and the regulations require that the Department's determination shall be based on the following four factors:

1. The needs of the student,
2. Approved special education rates,
3. The Department's experience with special education budgets, and
4. The cost per student in the district in which the residential setting is located.

**Factor #1
Needs of the Student**

With regard to the first factor – needs of the student – we interpret this factor, as we have in past determinations, to refer to the student's educational needs. If a student needs only regular education then we consider the fourth factor – the cost per student in the district in which the residential setting is located – in determining the contract amount. If the student has a disability and needs special education then we must also consider the second and third factors – approved special education rates and the Department's experience with special education budgets.

In assessing the special education needs of a student with a disability, we look to the extent, if any, to which the student will not participate with nondisabled students in the regular classroom in order to receive special education services (i.e. the time the student will spend a pull-out special education

program). Subsection 007.07A6 of Rule 51 requires that the extent of time a student must spend in pull-out programs must be included on each student's Individualized Education Program (IEP). Generally, the extent of a student's need for special education services will roughly correlate with the amount of time the student must spend in a pull-out program. Students with lesser needs spend little or no time in pull-out programs. Students with greater needs spend most or all of their time in pull-out programs. Generally, pull-out programs are more costly.

According to the IEP, the student in this case, M.W., spends 100% of their time in a pull-out program. Based on this information, we determine that M.W. has a greater need for special education services.

Factor #2 Approved Special Education Rates

We interpret the second factor – approved special education rates – to refer to reimbursable rates approved by NDE pursuant to Subsection 013.03 of NDE Rule 51. Under this Subsection, a “service provider” [defined in Subsection 003.62 to mean an individual or service agency, excluding a school district or approved cooperative] may receive a “provisionally approved rate” from NDE. Under Rule 51, school districts that contract with such “service providers” for special education services for a student may receive state reimbursement based on the NDE-established “provisionally approved rate.”

When a student receives services from a “service provider”, the second factor would require that we consider approved special education rates in determining the contract amount under Neb. Rev. Stat. 79-215(10)(b). In this case, no such consideration is necessary. LPS provides special education services to M.W. directly and does not contract for such services with a “service provider” having a “provisionally approved rate.” Therefore, there is no need to consider approved special education rates in making this determination.

Factor #3 The Department's Experience with Special Education Budgets

This request presents us with the first occasion for consideration of the Department's experience with special education budgets in connection with a determination of a contract amount. I note at the outset that the Department receives budget information from school districts based on total allowable program costs for the purpose of calculating state special education reimbursement, which is figured as a percentage of allowable excess program costs. The Department does not collect information on costs for individual children nor does it have uniform rules for school districts to calculate such costs. Although LPS and Auburn have submitted information on what their costs have been to educate M.W., in the absence of experience with individual student cost data reported according to uniform rules, we do not have an adequate basis for evaluating this information and using it to make a determination of a reasonable contract amount.

The Department gains experience with special education budgets through its receipt and analysis of yearly Final Financial Reports (FFRs) from school districts having special education programs. The FFRs contain information on each district's total special education program expenditures for the

school year based on allowable costs as described in Rule 51. Through the application of its knowledge and experience gained working with FFRs, the Department can make a reasonable determination of a school district's average cost per-student for special education services.

To determine an average per-student cost for special education services using information from the FFR, we take the district's reported expenditures for special education and support services, subtract any non-special education services expenditures (FLEX, IDEA CEIS and capital outlay) and add back in the district's average adjusted per pupil cost (AAPC), special education school-age transportation, and IDEA Enrollment/Poverty to arrive at a figure reasonably representative of the district's total expenditure for special education school-age services. Then, we divide the total expenditure for special education services by the number of students with verified disabilities (ages 6-12) reported by the district (in the NSSRS) for the year in question to arrive at a figure reasonably representative of the average per student special education cost of the district for school-age special education services in a particular year.

Based on our experience with special education budgets, we believe that the average per student special education cost calculated as described above is reasonably representative of a district's average cost to deliver special education services to school-age students with verified disabilities who are receiving services directly from the district. Also based on our experience, we expect that districts will experience some variation in this average cost depending on the intensity of programming its students need. In order to account for this variation in cost, we believe it reasonable to adjust this average cost for three categories of students – those needing less intense programs (in pull-out programs 20% or less of the time), those needing more intense programs (in pull-out programs 21% to 60% of the time), and those needing even more intense programs (in pull-out programs 61% to 100% of the time). Districts report information on the number of students in each of these three categories to the Department on October 1st of each year. Reporting in these categories is required by the U.S. Department of Education. For the purposes of this determination, we use information reported by LPS as of October 1st of 2009.

Taking into consideration LPS's total and average costs for special education school-age students (as determined above) and the number of special education students reported by LPS in each of the above categories, we believe it reasonable to adjust LPS's average per student special education cost downward by multiplying it by .75 for students needing less intense special education programs. For students needing more intense education programs, we believe it reasonable to adjust the per student special education cost upward by multiplying it by 2.0. For students needing even more intense programs, we believe it reasonable to adjust the per student cost upward by multiplying it by 3.0 (see attachments).

From the LPS special education expenditures reported to NDE for 2009-2010 (the most recently available), we calculate LPS's average per student special education cost to be \$9,926 (see attachment). To adjust LPS's average cost upward for students such as M.W., who need an even more intense program, we multiply \$9,926 by 3.0, for a special education per-student cost of \$29,778 (see attachment).

Factor #4
Cost per Student in District in Which the Residential Setting is Located

As in prior determinations, we calculate the cost per student in the district in which the residential setting is located – Factor #4 – with reference to the formula set forth in Neb. Rev. Stat. 79-598(3). This statute specifies a formula for calculating the cost per student when one school district is authorized or petitioned to contract with another district for the instruction for all or part of its pupils. Subsection (3) of 79-598 states as follows:

“(3) The contract price for instruction referred to in subsections (1) and (2) of this section shall be the cost per pupil for the immediately preceding school year or the current year, whichever appears more practical as determined by the board of the district which accepts the pupils for instruction. The cost per pupil shall be determined by dividing the sum of the operational cost and debt service expense of the accepting district, except retirement of debt principal, plus three percent of the insurable or present value of the school plant and equipment of the accepting district, by the average daily membership of pupils in the accepting district. Payment of the contract price shall be made in equal installments at the beginning of the first and second semesters.”

According to Department records, LPS’s cost per pupil calculated based on average daily membership (ADM) according to this formula for the 2009-2010 school year was \$9,159. This is the amount based on the Annual Financial Report (AFR) submitted by LPS for 2009-2010. The cost-per-pupil for 2010-2011 will not be available to the Department until next January.

Based upon the above considerations, the cost per student in LPS for the 2010-2011 school year is either the cost per student calculated pursuant to the formula set forth in Neb. Rev. Stat. 79-598(3) for the 2009-2010 school year, which is \$9,159 based on LPS’s AFR, or the cost per student calculated pursuant the formula for the 2010-2011 school year when that data becomes available; whichever amount appears more practical as determined by the Board of LPS.

Conclusion

I am aware from the correspondence provided that LPS believes the appropriate contract amount to be its tuition rate for students who are mildly mentally handicapped, as calculated by LPS based on itemized costs. However, the tuition rate of the school in which the residential setting is located is not among the factors to be considered by the Department in making this determination.

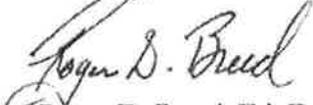
Based upon our considerations described above in connection with the four factors in Neb. Rev. Stat. 79-215(10)(b), I determine that the appropriate contract amount for educational services to M.W. for the 2010-2011 school year is LPS’s cost per student calculated pursuant to Neb. Rev. Stat. 79-598(3) plus LPS’s average per-student cost for school-age special education services adjusted upward for students receiving an even more intense program. According to our calculations based on the most recently available data (see attachments), this amount is \$38,937.

August 23, 2011

Page 6

I hope that this determination will be of assistance to both of your school districts. Please note that under Subsection 004.02 of Rule 19, if either of your districts is dissatisfied with this determination, it may be appealed to the State Board of Education pursuant to 92 NAC 61 (NDE Rule 61).

Sincerely,



Roger D. Breed, Ed. D.
Commissioner of Education

Attachments

cc Gary Sherman, NDE Office of Special Education
Beth Wierda, NDE Office of Special Education

Determination of Contract Cost required under 79-215(10)(b)

The amount of the contract cost is determined by adding:

- The general education per pupil cost for Lincoln Public School
AND
- The average special education per pupil cost for Lincoln Public School times the intensity of services

- A. The general education per pupil cost for Lincoln P.S.: \$ 9,159
 B. The average special education per pupil cost for Lincoln P.S.: \$ 9,926
 C. Level of Intensity of Program (See G3 Below) 3.
 D. SPED average per pupil cost X intensity of service: 3.0 (BXC): \$29,778
 E. Contract Cost for the student attending Lincoln Public Schools (A+D): **\$38,937**

F. Calculations:

District: Lincoln Public Schools		
FFR (SPED) 2009.10	Line: 03-0-999	\$41,731,600
Flex	Line: 03-7-000	- \$1,408,800
AAPC	Line: 01-3-0725	+\$3,177,850
AFR 2009-10		
Transportation School Age	+ \$3,617,101	
Capital Outlay	- \$505,532	+\$3,111,569
NIS 2009-10		
IDEA E/P	+ \$5,018,532	
CEIS	-\$1,048,816	+\$3,969,716
Total Costs		\$50,581,935
Total Costs divided by # of students age 6-21	5,096 students	Average per student Special Education Cost \$9,926
Average per student special education cost X intensity of services (See chart below)	300% (G3)	\$29,778

G. Intensity of Services

	Percent of time student receives special education services without regular education peers (i.e. amount of time child spends receiving services in pull out program):	Percent of Average per student special education cost:
G1	0 -20%	75% (.75)
G2	21% - 60%	200% (2.00)
G3	61% - 100%	300% (3.00)

* * *
Number of Children Reported by LPS as of
October 1, 2009, in the NSSRS, ages 6-21
as having a verified disability for the 2009-10
school year.

	20092010
LINCOLN PUBLIC SCHOOLS	5,096

Data as of 7/29/2011